93-156

Supreme Court, U.S.
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Case No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

MIRA SLOVAK AEROBATICS INC., Petitioner,

v.

CALIFORNIA STATE BOARD OF EQUALIZATION, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is whether the State of California's method of assessing Use Tax on Mobile Transportation Equipment (MTE), on equipment leased directly to the United States government results in the incidence of such tax falling upon the lessee (the United States government) and discriminates against the lessor (Petitioner) and whether the lessor's right to elect to have the Use Tax imposed upon the lessee becomes illusory when the lessee, the United States government, is exempt from taxation by the State of California.

PARTIES TO THE PROCEEDING

All parties in the Superior Court of California, County of Los Angeles and the Court of Appeal, State of California, Second Appellate District, Division Five, appear in the caption of this Petition.

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The opinion of the Superior Court for the County of Los Angeles is reprinted in the appendix (a-1 through a-6).

The unpublished opinion of the Court of Appeals for the Second Appellate District is reprinted in the appendix (a-9 through a-29).

The Supreme Court of the State of California denial for Petition for Review is reprinted in the appendix (a-29).

JURISDICTIONAL GROUNDS

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. Section 1257, Final Decisions of State courts.

In June, 1991, the Superior Court of the State of California for the County of Los Angeles determined that no triable issue of material fact was in dispute in that all pertinent facts were entered into

by stipulation between the parties. The trial court then granted Summary Judgment in favor of defendant State Board of Equalization.

On direct appeal, the Court of Appeals for the Second Appellate District, Division Five, affirmed the Judgment of the Superior Court of Los Angeles County.

A timely petition for review to the Supreme Court of the State of California was denied.

Petitioner Mira Slovak Aerobatics, Inc. seeks this Court's review pursuant to 28 U.S.C., Section 1257(3), which confers jurisdiction on this Court. Petitioner submits, pursuant to Rule 10.1(c), Rules of the Supreme Court of the United States, that the Court of Appeals Decision affirming the Judgment of the Superior Court's denial of relief on issues of

discrimination as a matter of law decides important questions of Federal law.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

At issue in this proceeding are:

28 U.S.C. Section 1257.

1. Final decisions of State courts.

2. Final judgments of decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution of the

United States.

3. California Revenue and Taxation Code, Section 6006(g) which provided in relevant part:

"Sale" means and includes: (g) Any lease of tangible personal property in any manner or by any means whatsoever, for consideration, except a lease of: (4) Mobile transportation equipment for use in transportation of persons of property as defined in Section 6023.

4. California Revenue and Taxation Code, Section 6023 which provided in relevant part:

"Mobile transportation equipment: includes equipment such as railroad cars and locomotives, buses, trucks ... aircraft and ships.

5. California Revenue and Taxation Code, Section 6381 which provided in

relevant part:

There are exempted from the computation of the amount of the sales tax the gross receipts from the sale of any tangible personal property to:

(a) The United States, its unincorporated agencies and instrumentalities.

STATEMENT OF THE CASE

Facts

On January 10, 1991 petitioner Mira Slovak Aerobatics, Inc. dba Mira Slovak Aviation, Inc. and respondent California State Board of Equalization, jointly filed a Stipulation of Facts which eliminated all triable issues of material fact. The parties stipulated to the following facts for the purposes of the summary judgment.

Plaintiff Mira slovak Aviation, Inc. is a California corporation in the business

of buying, selling and leasing aircraft. Slovak purchased seven aircraft for the specific purpose and intent of leasing them. The aircraft are mobile transportation equipment within the meaning of section 6023 of the Revenue and Taxation Code and as such incur no sales tax when purchased. Of the seven aircraft purchased, six were immediately leased to the United States government. Four of the six aircraft leased to the United States government (the "four aircraft") were leased and delivered and had their first functional use in California. United States government pilots took possession of these airplanes.

On or about October 1987, defendant State Board of Equalization audited plaintiff's records. Defendant sent a notice of determination under the sales

and use tax law dated August 19, 1988, which stated that a deficiency in sales and use tax in the amount of $36,598.32 and interest in the amount of $14,447.88 as of August 19, 1988 was due for the period commencing July 1, 1984 and ending June 30, 1987 for the four aircraft.

This August 1988 assessment was based upon the purchase price paid by plaintiff for the four aircraft because plaintiff did not elect to use the fair rental value. On September 16, 1988, plaintiff timely filed a petition for redetermination with defendant and requested a hearing. On January 23, 1989, defendant's hearing officer conducted a hearing on plaintiff's petition for redetermination. On February 24, 1989, the hearing officer issued a decision and recommendation denying the petition for

redetermination. Plaintiff then requested an oral hearing before the board.

On November 14, 1989, an oral hearing before the board was held. The board adopted the decision and recommendation of the hearing officer and ordered the tax redetermined without the adjustment. On january 12, 1990, defendant mailed a notice of redetermination to plaintiff denying the petition for redetermination and assessing a deficiency based on the use of the four aircraft. The amount of the assessed deficiency was: (1) $36,598.32 in sales and use taxes for the period of July 1, 1984 to June 30, 1987, and (2) $14,844.36 in interest on the deficiency from July 1, 1984 to August 31, 1988. The total assessment was $51,422.68.

On September 16, 1988, plaintiff paid

$36,598.32 to defendant and on October 6, 1988, plaintiff paid $14,844.36 to defendant. These payments constituted payment in full pursuant to the deficiency assessment.

The case rested entirely on an issue of Constitutional law.

Raising the Federal Question

On April 11, 1990, Petitioner filed a Complaint for Refund of Sales and/or Use Taxes, pursuant to California Revenue and Taxation Code, Section 6933.

On January 10, 1991, the parties filed a Stipulation of Facts which eliminated all triable issues of fact, leaving only the issue of Constitutional law.

On March 29, 1991, Petitioner filed a Motion for Summary Judgment (a-30 through a-40) which included his argument of discrimination against those businesses

who lease Mobile Transportation Equipment directly to the United States government.

On March 4, 1992, Petitioner filed his Appellant's Opening Brief (a-41 through a-55) which again included his argument of discrimination against those businesses who lease Mobile Transportation Equipment directly to the United States government. Despite the factual record and argument on appeal regarding this issue, the Court of Appeal of the State of California, Second Appellate District, Division Five, denied any appellate relief and denied rehearing, clarification or certification.

On January 15, 1993, Petitioner filed a Petition for Rehearing (a-56 through a-64) and on February 9, 1993, Petitioner filed his Petition for Review (a-54 through a-57) with the California Supreme Court which was denied.

California's Use Tax discriminates against businesses leasing Mobile Transportation Equipment directly to the United States Government.

California grants the lessor of Mobile Transportation Equipment the option of paying the tax or to elect to have the tax imposed upon the lessee. This election becomes illusory and disappears when the lessee is the United States Government. The lessor is denied the ability to collect the tax from the lessee when the lessee is the United States Government. The result of this scheme of taxation is to discriminate against a lessor doing business directly with the United States Government by forcing him to pay a tax that he could otherwise have elected to be passed on the lessee.

A. Nature of Action and Relief Sought.

This is an action for a Claim of Refund of overpayment of a discriminatory Use Tax, plus interest, in the amount of $51,442.68, brought against Respondent, State Board of Equalization, under authority of Section 6933 of the Revenue and Taxation Code.

ARGUMENT

The decision of the Court of Appeal of the State of California, Second Appellate District, Division Five conflicts with the decision of the United States Court of Appeals, Ninth Circuit as expressed in United States of America v. California State Board of Equalization, United States Court of Appeals, Ninth Circuit, 650 F.2d 1127 (1981); aff'd (1982) 456 US 901.

Petitioner contends that the scheme of

Use Tax taxation which the State of California has adopted on Mobile Transportation Equipment (MTE), discriminates against and penalizes businesses leasing MTE directly to the United States government.

This is a case of first impression since the statutes regarding the scheme of imposition of Use Tax by the State of California upon Mobile Transportation Equipment leased directly to the United States government have never been interpreted by any Court.

In the only case that has addressed a similar issue of the incidence of a tax imposed by a state upon the lease of goods to the United States government, United States of America v. California State Board of Equalization, United States Court of Appeals, Ninth Circuit, 650 F.2d 1127

(1981); aff'd (1982) 456 US 901, the Ninth Circuit Court of Appeals indicated that the imposition of the tax violated the United States' constitutional immunity from state taxation because the actual incidence of the tax fell upon the United States government, as lessee.

Petitioner, further contends that the incidence of this Use Tax, even when calculated upon the wholesale cost of the equipment, falls upon the user of the equipment and not upon the lessor. In the California Courts, the State of California has successfully argued that the logic of United States v. New Mexico, (1982), 455 U.S. 720, should be applied to this case, permitting the state to raise the cost of goods which are ultimately consumed by the United States government. The logic of United States v. New Mexico, supra. should

not be applicable to impose a tax upon a transaction where the United States government directly contracts for goods which the United States government will consume. In United States v. New Mexico, and all of the federal contractor cases, it has been held that it is permissible for the states to tax transactions between two private parties even though one of the parties is contracting for goods on behalf of the United States government. In none of the contractor cases, including United States v. New Mexico, is the United States government signatory to the transaction on which the tax has been assessed. Unlike United States v. New Mexico, and its related contractor cases, the United States government signed the underlying contracts which are the basis for these assessments. It has been consistently

argued by Petitioner that the case of United States of America v. California State Board of Equalization, aff'd (1982) 456 US 901, should be applied in the present case where the United States government is a party to the transaction which is the taxable event.

The California Use Tax is imposed upon a lessor of Mobile Transportation Equipment, based upon the lessor's wholesale cost of the equipment, unless the lessor elects to have the Use Tax imposed upon the rents generated by the leasing of the equipment.

Petitioner contents that the election to have the Use Tax assessed upon the gross rental receipts and passed on to the user is illusory when, as in this case, the user is the Bureau of Alcohol, Tobacco and Firearms, i.e. the United States

government.

Petitioner, Mira Slovak Aviation, Inc. is a dealer in airplanes, four of which were leased directly to the United States government. The State of California and the Courts below held that the incidence of the Use Tax imposed upon this transaction falls upon Mira Slovak Aviation, Inc. pursuant to United States v. New Mexico, a case commonly referred to as a Federal contractor case. Petitioner argues that the facts of this case should be controlled by the logic of United States of America v. California State Board of Equalization, supra. aff'd (1982) 456 US 901 which is not a Federal contractor case.

CONCLUSION

For the foregoing reasons Petitioner, MIRA SLOVAK AEROBATICS INC., respectfully

prays that this Court accept jurisdiction and issue its Writ of Certiorari in this cause to the State of California Second Appellate District, Division Five, reversing its judgment.

Respectfully submitted,

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Case No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

MIRA SLOVAK AEROBATICS INC., Petitioner,

v.

ALIFORNIA STATE BOARD OF EQUALIZATION, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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i. Orders and Judgments of the Superior Court of the State of California for the County of Los Angeles

a. Order for Entry of Summary Judgment

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

MIRA SLOVAK AVIATION, INC. Plaintiff, v. STATE BOARD OF EQUALIZATION, Defendant.	Case No. C 758 135 ORDER FOR ENTRY OF SUMMARY JUDGMENT

Hearing Held: May 8, 1991
Time: 8:30 a.m.
Place: Department 33
Discovery Cutoff: None
Motion Cutoff: None

Defendant's and Plaintiff's Motions for Summary Judgment came on for hearing on May 8, 1991, in Department 33 of the Above entitled Court, the Honorable Judith C. Chirlin, presiding. Plaintiff appeared through its counsel, Law Office of Leonard E. Aron, by Leonard E. Aron; Defendant, State Board of Equalization appeared through its counsel, Daniel E. Lungren, Attorney General of the State of California, by Clara L. Slifkin, Deputy Attorney General.

After full consideration of the evidence, stipulation of facts, points and authorities submitted by both parties and oral arguments of counsel, it appears and the Court finds that moving defendant has shown by admissible evidence and reasonable inferences therefrom not contradicted by other evidence or

inferences that the complaint has no merit and that there are no triable issues of material fact with respect thereto, and therefore defendant is entitled to judgment as a matter of law. The Court hereby rules as follows:

IT IS HEREBY ORDERED that no triable issues of material fact exist, and defendant State Board of Equalization is entitled to Judgment in its favor and against the plaintiff, Mira Slovak Aviation. No triable issue of material fact are in dispute in that all pertinent facts were entered into by stipulation.

IT IS FURTHER ORDERED that defendant is entitled to Judgment in its favor due to the following finding of facts by this Court:

1. The scheme of use taxation in California on mobile transportation

equipment does not impose an impermissible tax on the United States Government;

2. Under the California mobile transportation equipment taxing scheme a lease of mobile transportation equipment is a consumption or use by the lessor. This use tax is a tax on the lessor's use via the lease. The lease is an exercise of the lessor's right ownership which is within the definition of use in section 6009 of the California Revenue and Taxation Code.

3. The tax at issue is a tax imposed on plaintiff, Mira Slovak Aviation, the lessor of mobile transportation equipment and is not an impermissible tax on the lessee, the United States Government;

4. In a lease of mobile transportation equipment by a dealer in such equipment, who leases to the United States

Government, the incidence of the California use tax pursuant to Revenue and Taxation Code 6201 is upon the lessor and not upon the lessee.

5. Tax immunity is only proper when the state tax levy falls on the United States Government itself, or on an instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities for tax purposes. In the facts before this Court, since the tax on the lease of mobile transportation equipment was not directly on the United States Government and Mira Slovak Aviation was not so closely connected to the Government, the Court finds no immunity from the taxes in question.

IT IS FURTHER ORDERED that plaintiff take nothing by reason of this action and

that plaintiff is not entitled to a refund of taxes paid and interest.

Dated: June 20, 1991

Judith C. Chirlin
JUDGE OF THE SUPERIOR COURT

Approved as to form and content.

Dated: 5/29/91

Law Office of Leonard E. Aron

By: /s/
Leonard E. Aron
Attorney for the Plaintiff

b. Judgement by Court Under Civil Code of Procedure Section 437 (c)

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

MIRA SLOVAK AVIATION, INC. Plaintiff, v. STATE BOARD OF EQUALIZATION, Defendant.	Case No. C 758 135 JUDGMENT BY COURT UNDER CIVIL CODE PROCEDURE SECTION 437 (c)

Hearing Held: May 8, 1991
Time: 8:30 a.m.
Place: Department 33
Discovery Cutoff: None
Motion Cutoff: None
Trial Date: None

Defendant's and Plaintiff's Motions for Summary Judgment came on for hearing on May 8, 1991, in Department 33 of the above entitled Court, the Honorable Judith C. Chirlin, presiding. Plaintiff appeared through its counsel, Law Office of Leonard E. Aron, by Leonard E. Aron; Defendant, State Board of Equalization appeared

through its counsel, Daniel E. Lungren, Attorney General of the State of California, by Clara L. Slifkin, Deputy Attorney General.

This Court, having granted defendant's motion for summary judgment and denied plaintiff's motion for summary judgment on May 8, 1991, and having ordered entry of judgment on the complaint as requested in defendant's motion the Court rules as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff Mira Slovak Aviation take nothing by reason of this action and that plaintiff is not entitled to a refund of taxes paid and interest.

Dated: June 20, 1991

/s/ JUDITH C. CHIRLIN
JUDGE OF THE SUPERIOR COURT

Approved as to form and content.

Dated: 5/29/91

Law Office of Leonard E. Aron

By: /s/_____

Leonard E. Aron,
Attorney for the Plaintiff

ii

a. Appeal

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

MIRA SLOVAK AEROBATICS, INC., Plaintiff and Appellant, v. STATE BOARD OF EQUALIZATION, Defendant and Respondent.	2nd Civil No.B061724 (Super.Ct. No. C758135) Dated: 12-31-92

APPEAL from a judgment of the Superior Court of Los Angeles County. Judith C. Chirlin, Judge. Affirmed.

Leonard E. Aron for Plaintiff and Appellant.

Daniel E. Lungren, Attorney General, Edmond B. Mamer and Clara L. Slifkin, Deputy Attorneys General for Defendant and Respondent.

Plaintiff and appellant Mira Slovak Aerobatics., Inc., appeals from a summary judgment entered in favor of defendant and respondent the State Board of Equalization in Plaintiff's action to claim a refund of use tax paid under protest. Plaintiff contends that the use tax imposed on a lease of aircraft to the United States government violated the United States' immunity from taxation because the incidence of the use tax fell on the United States. We conclude that the trial court properly granted summary judgment against plaintiff because the undisputed facts show as a matter of law the

incidence of the use tax did not fall on the United States. Affirmed.

FACTS AND PROCEDURAL BACKGROUND

The parties stipulated to the following facts for the purposes of the summary judgment.

Plaintiff is a California corporation in the business of buying, selling and leasing aircraft. Plaintiff purchased seven aircraft for the specific purpose and intent of leasing them. The aircraft are mobile transportation equipment within the meaning of section 6023 of the Revenue and Taxation Code[1] and as such incur no sales tax when purchased. Of the seven aircraft purchased, six were immediately

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[1] All further references to code sections are to the Revenue and Taxation Code unless otherwise specified.

leased to the United States government.[2] Four of the six aircraft leased to the United States government (the "four aircraft") were leased and delivered and had their first functional use in California.[3]

On or about October 1987, defendant audited plaintiff's records. Defendant sent a notice of determination under the sales and use tax law dated August 19, 1988, which stated that a deficiency in sales and use tax in the amount of $36,598.32 and interest in the amount of $14,447.88 as of August 19, 1988 was due for the period commencing July 1, 1984 and ending June 30, 1987 for the four

[2] One of the airplanes was leased to and used in the state of New Mexico.

[3] Two of these six were leased to the United States government, but delivered and operated exclusively outside the state of California

aircraft.

This August 1988 assessment was based upon the purchase price paid by plaintiff for the four aircraft because plaintiff did not elect to use the fair rental value.[4] On September 16, 1988, plaintiff timely filed a petition for redetermination with defendant and requested a hearing. On January 23, 1989, defendant's hearing officer conducted a hearing on plaintiff's petition for redetermination. On February 24, 1989, the hearing officer issued a decision and recommendation denying the petition for redetermination. Plaintiff then requested an oral hearing before the board.

On November 14, 1989, an oral hearing before the board was held. The board

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[4] No use tax was assessed on the three aircraft delivered and used outside the state of California.

adopted the decision and recommendation of the hearing officer and ordered the tax redetermined without the adjustment. On January 12, 1990, defendant mailed a notice of redetermination to plaintiff denying the petition for redetermination and assessing a deficiency based on the use of the four aircraft. The amount of the assessed deficiency was: (1) $36,598.32 in sales and use taxes for the period of July 1, 1984 to June 30, 1987, and (2) $14,844.36 in interest on the deficiency from July 1, 1984 to August 31, 1988. The total assessment was $51,422.68.

On September 16, 1988, plaintiff paid $36,598.32 to defendant and on October 6, 1988, plaintiff paid $14,844.36 to defendant. These payments constituted payment in full pursuant to the deficiency

assessment.

On October 18, 1988, plaintiff filed a claim for refund with defendant in the amount of $51,442.68. Defendant failed to act upon plaintiff's claim for refund within six months, and plaintiff considered the claim denied. No portion of the amounts paid by plaintiff have been refunded or applied for the benefit of plaintiff.

On April 11, 1990, plaintiff filed a complaint for refund of sales and/or use taxes in superior court for $51,442.68 and interest as provided by law. Plaintiff alleged that since the United States government was the consumer of the aircraft on which these taxes were assessed, the taxes are contrary to the prohibition against states taxing the federal government.

On July 3, 1990, plaintiff answered denying the allegations set forth.

On March 29, 1991, plaintiff filed a motion for summary judgment and on April 9, 1991, defendant filed a cross-motion for summary judgment. On January 10, 1991, the parties filed stipulated facts upon which the trial court could base each of the summary judgments.

At the hearing on May 8, 1991, on the cross-motions for summary judgment the trial court found that no triable issue of material fact existed and that defendant is entitled to judgment as a matter of law.[5] On June 20, 1991, judgment was

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[5] The trial court found that: (1) the scheme of taxation used in California on aircraft does not impose an impermissible tax on United States government: (2) under the taxing scheme a lease of an aircraft is a consumption or use by the lessor; (3) the use tax is a tax on the lessor's use via the lease; (4) the lease is an exercise of the

entered by the trial court and plaintiff timely appealed.

DISCUSSION

Plaintiff contends the incidence of the use tax falls on the United States and its option to elect to measure the tax by the fair rental value, although not made, was

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lessor's right of ownership which is within definition of use in section 6009 of the California Revenue and Taxation Code; (5) the tax at issue is a tax imposed on plaintiff as the lessor of the aircraft and is not an impermissible tax on the lessee, United States government; (6) in a lease of aircraft by a dealer to the United States government of the incidence of the California use tax pursuant to section 6201 is upon the lessor and not upon the lessee; (7) tax immunity is only proper when the state tax levy falls on the United States government itself or on an instrumentality so closely connected to the government that the two cannot realistically be viewed as separate entities for tax purposes; and (8) in the instant case since the tax on the lease of the aircraft was not directly on the United States government and plaintiff was not so closely connected to the government, the court finds no immunity from the taxes in question.

illusory because plaintiff could not pass the amount on to the United States government.

Standard of Review

In reviewing a summary judgment, we conduct an independent review of the trial court's disposition. (Olson v. Federal Ins. Co. (1990) 219 Cal.App.3d 252, 260.) We must determine if "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., Section 437c, subd. (c); . AARTS Productions, Inc. v. Crocker National Bank (1986) 179 Cal.App.3d 1061, 1064-1065.) "A defendant moving for summary judgment must conclusively engage a necessary element of the plaintiff's case or establish a complete defense and thereby

demonstrate that under no hypothesis is there a material factual issue which requires the process of a trial." (Saatzer v. Smith (1981) 122 Cal.App.3d 512, 517.) The ultimate resolution of whether defendant's statutes and regulations were correctly interpreted cases with the court and is a question of law for this court. (MCI Airsignal, Inc. v. State Bd. of Equalization (1991) 1 Cal.App.4th 1527, 1530; Newco Leasing, Inc. v. State Bd. of Equalization (1983) 143 Cal.App.3d 120, 122-123.)

Mobile Transportation Equipment Taxation Scheme

The sales and use tax law (Section 6001 et seq.) imposes a privilege tax upon the retail seller based on the gross receipts of sales or the use of tangible personal

property.[6] (Sections 6051, 6210; Wallace Berrie & Co. v. State Bd. of Equalization, supra, 40 Cal.3d 60, 66; MCI Airsignal, Inc. v. State Bd. of Equalization, supra, 1 Cal.App.4th 1527, 1529-1530).) The sales tax is an excise tax on the privilege to sell and a use tax is its counterpart imposed on the use or consumption of property, where the acquisition of the property by the user or consumer was for certain reasons not subject to the sales tax. (Section 2601, 6202; Newco Leasing, Inc. v. State Bd. of Equalization, supra, 143 Cal.App.3d 120, 122-123.) A retailer is generally authorized and required to collect the sales tax or use tax form the purchaser or

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[6] Tangible personal property "Means personal property which may be seen, weighed, measured, felt, or touched, or which is in any other manner perceptible to the senses." (Section 6016.)

user. (Section 6203; Newco Leasing, Inc. v. State Bd. of Equalization, supra, 143 Cal.App.3d 120, 123.)

Most leases are a sale or purchase and subject to the taxation scheme set forth above (Section 6006, subd. (g).) However, the leasing of mobile transportation equipment, i.e., aircraft, is an exception to this general rule and is taxed under the mobile transportation equipment taxation scheme. (Section 6006, subd. (g)(4).) Thus, the use of aircraft by an individual or a business entity engaged in the business of leasing equipment to the public is taxed through a use tax. (Section 6202.)[7] The use tax is based on

[7] The consumer of tangible personal property purchased in this state is liable for use tax except where the retailer collects the tax from the consumer and the consumer has a receipt so indicating. The taxable even is the use of the property and the statutory definition of

the purchase price or the fair rental value. (Sections 6009, 6094, subd. (d); see, Newco Leasing, Inc. v. State Bd. of Equalization, supra, 143 Cal.App.3d 120, 123.) The taxable event occurs when the lessor first leases the aircraft because the lease constitutes the owner's exercise of a right of ownership over the property.

In determining whether the legal incidence of the use tax on the mobile transportation equipment falls on the United States government, the key consideration is not whether the United States shoulders the burden of the levy,

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use includes the owner's use of the property by means of leasing it. (Sections 6202, 6009.) The use under section 6009, in this case the leasing of the airplane to the government, is the taxable event. The taxable event is payable at the election of plaintiff based on either the purchase price or the total rental receipt. Here plaintiff made no timely election. (Section 6094, subd. (d).)

but whether the levy falls on the United States itself or on an instrumentality so closely connected to the government that the two cannot be realistically viewed as separate entities, at least so far as the activity being taxed is concerned.[8] (United States v. New Mexico (1982) 455 U.S. 720, 735.)

In New Mexico, the United States Supreme Court held in part that the contractors were independent taxable entities and were not protected from state use taxes even though the use tax had an effect on the United States. The New Mexico use tax, as in this matter, was imposed on property used in New Mexico which as not already taxed. In New Mexico

[8] Plaintiff does not argue on appeal that it is so closely connected to the United States government that the two can be viewed as one.

even though the use tax was on United States government property being used by an independent entity, the holding is applicable here where we have private property being used by the United States government. The Supreme Court held the subject of the levy is the taxed entity's beneficial use of the property and unless the entity is one of the United States government's "'constituent parts'", then the use tax is not on the United States. The property is simply being used in the furtherance of the entity's "essentially independent commercial enterprise." (Id. at pp. 741-742.).

"[I]mmunity may not be conferred simply because the tax has an effect on the United States, or even because of the Federal Government shoulders the entire economic burden of the levy." (Id. at p.

734.) "Similarly, immunity cannot be conferred simply because the state tax falls on the earnings of a contractor providing services to the Government. [Citation.] And where a use tax is involved, immunity cannot be conferred simply because the State is levying the tax on the use of federal property in private hands, [citation], even if the private entity is using the Government property to provide the United States with goods, [citations], or services, [citations]. In such a situation the contractor's use of the property 'in connection with commercial activities carried on for profit,' is 'a separate and distinct taxable activity.' [Citation.] Indeed, immunity cannot be conferred simply because the tax is paid with Government funds . . . ." (Id. at pp. 734-

735.)

"In order to prevent the possibility of untoward economic consequences [when the fax is finally due], the lessor of mobile transportation equipment who wishes to sell the leases must consider the tax factor in determining his selling price. Similarly the buyer must consider the tax consequences in agreeing to the purchase price. The answer . . . lies in creative bargaining and the dynamics of the marketplace." (Newco Leasing, Inc. v. State Bd. of Equalization, supra, 143 Cal.App.3d 120, 124.)

We conclude that the legal incidence of the use tax for the four aircraft, which are mobile transportation equipment, falls on plaintiff and does not impose an impermissible tax on the United States government. Plaintiff's lease of the four

aircraft to the United States government was a consumption or use by plaintiff while conducting an "essentially independent commercial enterprise." The use under section 6009, in this matter the leasing of the four aircraft to the government, is the taxable event. The taxable event was specifically payable by plaintiff based either on the purchase price or the total rental receipts. Plaintiff made no timely election and defendant properly assessed a deficiency based on the purchase price paid by plaintiff for the four aircraft. Under the mobile transportation equipment taxation scheme it is plaintiff's beneficial use of the four aircraft, or plaintiff's initial leasing of the four aircraft, which is the taxable event. That beneficial use is the subject of the

levy and since it was not directly on the United States government, the use tax imposed is not an impermissible tax on the United States even though it may have some effect on the United States. As noted in Newco leasing, Inc. v. State Bd. of Equalization, supra, 143 Cal.App.3d 120, the tax is not necessarily passed on to the lessor of the aircraft. It can be subsumed by creative bargaining upon purchase or dissipated in the dynamics of the market place. The delayed imposition of sales tax upon the purchase of aircraft does not operate to have the legal incidence of the use tax fall on the United States government.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

JACKSON, J.*

We concur:

TURNER, P.J. BOREN, J.

(*Assigned by the Chairperson of the Judicial Council.)

iii

a. Denial of Petition for Review

Second Appellate District,
Division Five, No. B061724
S031134

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

MIRA SLOVAK AEROBATICS INC., Appellant

v.

STATE BOARD OF EQUALIZATION, Respondent

Appellant's petition for review DENIED. The request for an order directing publication of the opinion is denied. Mosk, J. is of the opinion the request should be granted.

LUCAS

Chief Justice

Dated: 3-31-93

iv. Other Materials

a. Motion for Summary Judgment

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

MIRA SLOVAK AEROBATICS, INC., dba MIRA SLOVAK AVIATION, Plaintiff, vs. STATE BOARD OF EQUALIZATION, Defendant.	Case No. C 758 135 MOTION FOR SUMMARY JUDGMENT

POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

It is Plaintiff's position that the scheme of use tax taxation which the State of California has adopted on Mobile Transportation Equipment (MTE) imposes an impermissible tax on the United States Government.

I.

"THE STATE OF CALIFORNIA IS AN INSEPARABLE PART OF THE UNITED STATES OF AMERICA, AND THE UNITED STATES CONSTITUTION IS THE SUPREME LAW OF THE LAND." Article III, Section 1,

California Constitution

In 1819 the Supreme Court held that the Supremacy Clause invalidated a state tax imposed directly on actions of a federal instrumentality. It is uncontroverted that the State of California lacks jurisdiction to tax the United States Government.

Defendant claims that the scheme of imposition of use tax on Mobile Transportation Equipment (MTE) taxes the lessor (Mira Slovak Aerobatics, Inc.) and

not the lessee (the United States Government) which is claimed to be a permissible increasing of the cost of goods to the United States Government.

The cases cited to support this proposition deal exclusively with federal construction contractors and are not factually similar to the present situation.

In the federal construction contractor cases, the contractors who are not dealers in the goods involved have attempted to avoid paying sales tax on items to be used to complete United States Government construction contracts through various artifices which placed the form of the transactions over the substance of the transactions. In the present case, Plaintiff is a dealer in airplanes of the type leased to the United States

Government. When the airplanes are returned at the end of the leases, Plaintiff will sell the airplanes in transactions which, if not otherwise exempt, will generate sales tax based upon that portion of the economic life which remains in the airplanes at that time. Plaintiff has attached hereto and incorporates by this reference as Exhibit "2" Section 64.100 through Section 64.102 inclusive of Matthew Bender & Company, Inc. California Tax Service as the most recent and comprehensive citations of the law applicable to those aspects of this case not dealing precisely with MTE.

The determination in this case is further complicated by the apparent option of the lessor to elect to have the California Use Tax imposed upon the lessee and calculated upon the consideration

being paid by the lessee for the use of the MTE.

II.

"LEASES OF MOBILE TRANSPORTATION EQUIPMENT... ARE NOT 'SALES' OR 'PURCHASES' UNDER THE SALES AND USE TAX LAW. HOWEVER, LESSORS OF MOBILE TRANSPORTATION WHO HAVE ELECTED TIMELY TO REPORT THEIR TAX LIABILITY BASED UPON FAIR RENTAL VALUE ARE ALLOWED TO PASS THEIR USE TAX LIABILITY ON AS A SEPARATELY STATED ITEM TO THE LESSEE. (emphasis added). THE SEPARATELY STATED TAX WILL NOT BE CONSIDERED EXCESS TAX REIMBURSEMENT AND WILL NOT BE INCLUDED IN THE FAIR RENTAL VALUE. ON THE OTHER HAND, TREATMENT OF EXCESS OF TAX REIMBURSEMENT IS DIFFERENT WHEN A LESSOR OF MOBILE

TRANSPORTATION EQUIPMENT PURCHASES SUCH EQUIPMENT EX-TAX UNDER A RESALE CERTIFICATE AND COLLECTS TAX REIMBURSEMENT ON THE RENTAL RECEIPTS, BUT PAYS NO TAX TO THE STATE. IN THIS SITUATION, THE LESSOR MUST PAY TAX ON THE PURCHASE PRICE OF THE EQUIPMENT SINCE A TIMELY ELECTION TO MEASURE THE TAX BY FAIR RENTAL VALUE WAS NOT MADE. HOWEVER, TO THE EXTENT THAT THE TAX REIMBURSEMENT COLLECTED ON RENTAL RECEIPTS EXCEEDS THE TAX LIABILITY MEASURED BY THE PURCHASE PRICE, IT MUST BE RETURNED TO THE LESSEE OR PAID TO THE STATE."

Page 12, Tax Tips for Leasing of Tangible Personal Property in California, California State Board of Equalization, Pamphlet #46, April, 1986, Exhibit "3"

attached hereto.

It must be argued that in this instance, Plaintiff (lessor) believed that the U.S. Government would be exempt from tax, and it would be unnecessary and unconstitutional to elect to have the tax borne by the lessee (U.S. Government) and so made no election.

The election to pass the tax on to the lessee is illusory where the lessee is the Government of the United States. How can one elect to measure tax on a greater sum, the imposition of which on that particular lessee is unconstitutional. The lessor has an incentive to pass the tax on to the lessee and has an option and a right to do so. In the case where the lessee is the United States Government, that option is non-existent. This fact is recognized by Defendant in the instructions to the

Quarterly Sales and Use Tax return, Form BT-401-A (S3F) REV. 40 (1-88) for line 7, attached hereto as Exhibit "4", which applies to sales to the United States government and provides: "Use tax applies to leases of mobile transportation equipment."

When a dealer leases MTE to the United States Government, the election disappears which denies the lessor of the ability to collect the tax from the consumer had the consumer not been the United States Government. This scheme of taxation discriminates against the United States Government and those who lease MTE to the United States Government.

Plaintiff believes that the outcome of this case should be controlled by the same logic which prevailed for the United States Government in the case of U.S. v

State Board of Equalization, infra.

III.

THE CALIFORNIA SALES TAX LAW ON LEASES OF TANGIBLE PERSONAL PROPERTY TO THE UNITED STATES VIOLATES THE GOVERNMENT'S CONSTITUTIONAL IMMUNITY FROM STATE TAXATION BECAUSE THE LEGAL INCIDENCE OF THE TAX FALLS ON THE UNITED STATES...THE ACTUAL INCIDENCE OF THE TAX IS ON THE GOVERNMENT AS LESSEE, IS A VIOLATION OF THE CONSTITUTION.

U.S. v. SBE (CA-9, 1981) 650 F2d 1127; aff'd (1982) 456 US 901.

CONCLUSION

This Plaintiff can see little factual difference in whether the lessor leases MTE or other items of tangible personal property to the United States Government. Again, quoting from TAx Tips for Leasing,

etc., under the heading of leases to the Federal Government, Page 10, "Tax does not apply to leases of tangible personal property (including automobiles), to the United States Government. . . and certain other federal institutions not wholly owned by the United States Government and which are constitutionally exempt from state taxation." (emphasis added). And yet, in the same booklet under the heading "Special Categories of Leases Exempt from Tax" the state exempts "aircraft leased to common carriers, foreign governments, and non-residents of this state who will not use the aircraft in this state other than in the removal of such aircraft from this state." Why should the state exempt these entities from taxation, while not giving the United States Government the same exemption? Does this not constitute an

indiscriminate tax on either the United States Government or one doing business with the United States Government? This Court must determine whether the particular scheme of taxation results in the imposition of use tax on the lessee. This Court must determine whether the scheme of taxation results in an impermissible tax despite the words of the statutes which technically imposed the tax liability upon the lessor. It is contended that this scheme of taxation does result in an impermissible tax upon the United States Government.

Thus, as a matter of law, Plaintiff is entitled to judgment on the Complaint for Refund of Sales and/or Use Taxes.

Respectfully submitted,

Dated: March ___, 1991

Leonard E. Aron, Esq.
Attorneys for Plaintiff

b. Appellant's Opening Brief

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MIRA SLOVAK AEROBATICS, INC. doing business as MIRA SLOVAK AVIATION, INC., Plaintiff/Appellant, vs. STATE BOARD OF EQUALIZATION, Defendant/Respondent.	2nd Civil No: BO61724 (Superior Court No. No: C 758 C 758 135 Los Angeles County)

APPELLANT'S OPENING BRIEF

STATEMENT OF CASE

A. Nature of Action and Relief Sought.

This is an action for a Claim of Refund of overpayment of Use Tax and interest in

the amount of $51,442.68, plus interest, brought against Defendant, State Board of Equalization, under authority of Section 6933 of the Revenue and Taxation Code [CT 1-5].

B. Judgment of Superior Court

The Superior Court of California, County of Los Angeles, by the Honorable Judith C. Chirlin, Judge, rendered its final judgment for Defendant following a hearing by the Court [CT 203-205]. The Judgment was entered on June 20, 1991 and Notice of Entry of Judgment was mailed by counsel for Defendant on July 25, 1991 [CT 207]. A Notice of Appeal from the Judgment was timely filed on September 20, 1991 [CT 208-210].

This Appeal is from a Judgment that disposes of all issues between the parties.

C. Summary of Facts.

On January 10, 1991 Plaintiff and Defendant jointly filed a Stipulation of Facts [CT 11-15] which was intended to eliminate all triable issues of material fact. The case rested entirely on an issue of Constitutional law.

Plaintiff contends [CT 18] and Defendant opposes [CT 41] that the scheme of Use Tax taxation which the State of California has adopted on Mobile Transportation Equipment (MTE) imposes an impermissible tax on the United States Government.

ARGUMENT

I.

"THE STATE OF CALIFORNIA IS AN INSEPARABLE PART OF THE UNITED STATES OF AMERICA, AND THE UNITED STATES CONSTITUTION IS THE SUPREME

LAW OF THE LAND." Article III, Section 1, California Constitution

In its ruling, the Trial Court found that the incidence of the Use Tax on MTE fell upon the lessor and not the consumer. [RT 2, lines 2-14]

A. In 1819 the Supreme Court held that the Supremacy Clause invalidated a state tax imposed directly on actions of a federal instrumentality. It is uncontroverted that the State of California lacks jurisdiction to tax the United States Government.

Defendant claims that the scheme of imposition of Use Tax on Mobile Transportation Equipment (MTE) taxes the lessor (Mira Slovak Aerobatics, Inc.) and not the lessee (the United States Government) which is claimed to be a permissible increasing of the cost of

goods to the United States Government.

There are no published cases that refer to the imposition of a Use Tax on MTE where the Federal government is the lessee. However, in U.S. v County of Fresno, (1977) 429 US 452, the Court interpreted the immunity doctrine to mean that the state may not impose taxes directly on the Federal government, nor may they impose taxes the legal incidence of which falls on the Federal government. The only cases published that support Defendants proposition deal exclusively with Federal construction contractors and are not factually similar to the present situation.

In the Federal construction contractor cases, the contractors, who are not dealers in the goods involved, have attempted to avoid paying sales tax on

items to be used to complete United States Government construction contracts through various artifices which, if allowed, would permit the form of the transactions to control over the substance of the transactions.

In the present case, Plaintiff is a dealer in airplanes of the type leased to the United States Government. When the airplanes are returned at the end of the lease period, Plaintiff will sell the airplanes in transactions which, if not otherwise exempt, will generate sales tax based upon that portion of the economic life which remains in the airplanes at that time.

The determination in this case is further complicated by the option of the lessor to elect to have the California Use Tax imposed upon the lessee and calculated

upon the consideration being paid by the lessee for the use of the MTE. This option is illusory as applied to the lease of MTE to the United States Government.

II.

"LEASES OF MOBILE TRANSPORTATION EQUIPMENT... ARE NOT 'SALES' OR 'PURCHASES' UNDER THE SALES AND USE TAX LAW. HOWEVER, LESSORS OF MOBILE TRANSPORTATION WHO HAVE ELECTED TIMELY TO REPORT THEIR TAX LIABILITY BASED UPON FAIR RENTAL VALUE ARE ALLOWED TO PASS THEIR USE TAX LIABILITY ON AS A SEPARATELY STATED ITEM TO THE LESSEE. THE SEPARATELY STATED TAX WILL NOT BE CONSIDERED EXCESS TAX REIMBURSEMENT AND WILL NOT BE INCLUDED IN THE FAIR RENTAL VALUE. ON THE OTHER HAND, TREATMENT OF EXCESS OF TAX REIMBURSEMENT IS

DIFFERENT WHEN A LESSOR OF MOBILE TRANSPORTATION EQUIPMENT PURCHASES SUCH EQUIPMENT EX-TAX UNDER A RESALE CERTIFICATE AND COLLECTS TAX REIMBURSEMENT ON THE RENTAL RECEIPTS, BUT PAYS NO TAX TO THE STATE. IN THIS SITUATION, THE LESSOR MUST PAY TAX ON THE PURCHASE PRICE OF THE EQUIPMENT SINCE A TIMELY ELECTION TO MEASURE THE TAX BY FAIR RENTAL VALUE WAS NOT MADE. HOWEVER, TO THE EXTENT THAT THE TAX REIMBURSEMENT COLLECTED ON RENTAL RECEIPTS EXCEEDS THE TAX LIABILITY MEASURED BY THE PURCHASE PRICE, IT MUST BE RETURNED TO THE LESSEE OR PAID TO THE STATE."

Page 12, Tax Tips for Leasing of Tangible Personal Property in California, California State Board of Equalization,

Pamphlet #46, April, 1986, [CT 34].

It must be argued that in this instance, Plaintiff (lessor) believed that the United States Government would be exempt from tax, and it would be unnecessary and unconstitutional to elect to have the tax borne by the lessee (U.S. Government) and so made no election.

The election to pass the tax on to the lessee is illusory where the lessee is the Government of the United States. How can one elect to measure tax on a greater sum, the imposition of which on that particular lessee is unconstitutional. The lessor has an incentive to pass the tax on to the lessee and has an option and a right to do so. In the case where the lessee is the United States Government, that option is non-existent. This fact is recognized by Defendant in the instructions to the

Quarterly Sales and Use Tax return, Form BT-401-A (S3F) REV. 40 (1-88) for line 7, [CT 35] which applies to sales to the United States government and provides:

"Use tax applies to leases of mobile transportation equipment."

When a dealer leases MTE to the United States Government, the election disappears which denies the lessor of the ability to collect the tax from the consumer had the consumer not been the United States Government. This scheme of taxation discriminates against the United States Government and those who lease MTE to the United States Government.

Plaintiff believes that the outcome of this case should be controlled by the same logic which prevailed for the United States Government in the case of U.S. v State Board of Equalization, infra.

III.

THE CALIFORNIA SALES TAX LAW ON LEASES OF TANGIBLE PERSONAL PROPERTY TO THE UNITED STATES VIOLATES THE GOVERNMENT'S CONSTITUTIONAL IMMUNITY FROM STATE TAXATION BECAUSE THE LEGAL INCIDENCE OF THE TAX FALLS ON THE UNITED STATES...THE ACTUAL INCIDENCE OF THE TAX IS ON THE GOVERNMENT AS LESSEE, IS A VIOLATION OF THE CONSTITUTION.

U.S. v. State Board of Equalization (CA-9, 1981) 650 F2d 1127; aff'd (1982) 456 US 901.

While U.S. v State Board of Equalization, supra deals with tangible personal property, MTE is excluded only because the State of California has defined MTE not to be tangible personal property. In all other respects, MTE is,

in fact, tangible personal property and the underlying logic of the U.S. v. State Board of Equalization, supra is applicable to the facts of this case. To permit the State of California to impose a Use Tax on the lease of the MTE to the United States Government by defining MTE as not tangible personal property, is to put form over substance, an impermissible act for a taxpayer in the "contractor cases" and which should be impermissible for the State of California.

Just as the Court in U.S. v State Board of Equalization, supra found that the imposition of the sales tax "places the legal incidence of the tax on the United States and, therefore, violates the United States' constitutional immunity from state taxation, so should this Court find that the imposition of the Use Tax on MTE also

places the legal incidence of the tax on the United States and, therefore, violates the United States' constitutional immunity from state taxation.

CONCLUSION

This Plaintiff can see little factual difference in whether the lessor leases MTE or other items of tangible personal property to the United States Government. Again, quoting from Tax Tips for Leasing, etc., under the heading of leases to the Federal Government, Page 10:

> "Tax <u>does not</u> apply to leases of tangible personal property (including automobiles), to the United States Government. . . and certain other federal institutions not wholly owned by the United States Government and which are constitutionally exempt from state

taxation." (emphasis added).

Yet, in the same booklet under the heading "Special Categories of Leases Exempt from Tax" the state exempts:

> "aircraft leased to common carriers, foreign governments, and non-residents of this state who will not use the aircraft in this state other than in the removal of such aircraft from this state."

Why should the state exempt these entities from taxation, while not giving the United States Government the same exemption? Does this not constitute an indiscriminate tax on either the United States Government or one doing business with the United States Government?

In United States v. City of Detroit, 355 U.S. 469 the Court stated that:

"in determining whether a tax is

actually laid on the United States or its property the Court goes beyond the bare face of the taxing statute to consider all relevant circumstances."

This Court must determine whether the particular scheme of taxation results in the imposition of use tax on the lessee. This Court must determine whether the scheme of taxation results in an impermissible tax despite the words of the statutes which attempt to impose the incidence of the tax liability upon the lessor. It is contended that this scheme of taxation does result in an impermissible tax upon the United States Government.

WHEREFORE, Appellant prays that this Court reverse the Judgment from which this Appeal was taken.

DATED: March 14, 1992

Respectfully submitted,

LAW OFFICES OF LEONARD E. ARON

By: s/s
Leonard E. Aron, Esq.

c. Petition for Rehearing

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

MIRA SLOVAK AEROBATICS, INC., doing business as MIRA SLOVAC AVIATION, INC.,	2nd Civil No.B061724 (Superior Court No: C758135 Los Angeles County)
Plaintiff/Appellant.	
vs.	
STATE BOARD OF EQUALIZATION	
Defendant/Respondent.	Dated: 1-15-93

PETITION FOR REHEARING

To the Honorable, J. Jackson, Presiding Justice and to P.J. Turner and J. Boren,

Associate Justices of the Court of Appeal of the State of California, Second Appellate District, Division 5:

POINT I

THE DECISION OF THIS COURT HAS OVERLOOKED THE DISSIMILARITY OF FACTS AND APPLICABLE LAW OF THE CASE AT BAR WITH THE DECISION IN NEWCO LEASING, INC. v. STATE BOARD OF EQUALIZATION, (1983) 143 Cal.App.3d 120. WHICH IS CITED AND DISCUSSED ON PAGES 8, 9 AND 12 OF THIS COURT'S DECISION AND ON PAGE 13 OF RESPONDENT'S BRIEF AND IS CONTROLLING ON IMPORTANT ISSUES IN THIS CASE.

In analyzing the facts and applicable law of Newco Leasing, Inc. v. State Board of Equalization, supra. this Court has failed to distinguish the fact that the lessor in Newco leased the Mobile Transportation Equipment to the public,

while in the case at bar, the lessor leased the Mobile Transportation Equipment to the United States Government. Accordingly, it is unrealistic to expect a retailer who is generally authorized and required to collect the sales tax or use tax from the purchaser or user from imposing and collecting this tax when the purchaser or user is the United States Government.

POINT II

THE DECISION OF THIS COURT HAS OVERLOOKED THE DISSIMILARITY OF FACTS AND APPLICABLE LAW OF THE CASE AT BAR WITH THE DECISION IN U.S. V. NEW MEXICO, (1982), 455 U.S. 720, WHICH IS CITED AND DISCUSSED ON PAGE 10 OF THIS COURT'S DECISION AND ON PAGES 6, 7, 8, 10 AND 11 OF RESPONDENT'S BRIEF AND IS CONTROLLING ON IMPORTANT ISSUES IN THIS CASE.

It has been argued by Appellant that U.S. v. New Mexico, supra., the real property in interest was a contractor acquiring goods to be consumed in the performance of services for the United States Government.

It is conceded for the purpose of this argument only that the California scheme of taxation of Mobile Transportation Equipment differs slightly from the method of imposing a use tax on the lease of non-Mobile Transportation Equipment, tangible personal property. This difference, however, is negligible in that the lessor of Mobile Transportation Equipment has an election available to him, which if not made, causes the use tax to be assessed based upon the lessor's cost of the leased property. It is not clear whether this election causes the outcome of the case at

bar to be controlled by the logic of U.S. v. New Mexico, supra.

POINT III

THE DECISION OF THIS COURT HAS OVERLOOKED THE SIMILARITY OF FACTS AND APPLICABLE LAW OF THE CASE AT BAR WITH THE DECISION OF THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT IN THE CASE OF UNITED STATES of AMERICA V. CALIFORNIA STATE BOARD OF EQUALIZATION, 650 F.2d 1127 (1981) WHICH IS CITED AND DISCUSSED ON PAGES 6 AND 7 OF APPELLANT'S OPENING BRIEF, ON PAGES 9 AND 10 OF RESPONDENT'S BRIEF AND IS CONTROLLING ON IMPORTANT ISSUES IN THIS CASE.

The facts and applicable law of the case at bar have a strong similarity to those in United States of America v. California State Board of Equalization, supra. if this Court agrees with the

comparison in Newco Leasing, Inc. v. State Board of Equalization, supra. which was that the sales tax in California is an excise tax on the privilege of selling tangible personal property at retail and its counterpart or complimentary tax - the use tax - is a similar type of tax, than an analysis of the Court's rulings and rationale in United States of America v. California State Board of Equalization, is obligatory.

In United States of America v. California State Board of Equalization, supra, at 1128, that Court "affirmed the district court's decision that the California sales tax is unconstitutional as to leases of tangible personal property to the United States Because the legal incidence of the sales tax falls on the United States." Appellant is in the

business of leasing airplanes to the United States Government. For appellant to have elected to pass the use tax on to the lessee is illusory and would have forced the apparent incidence of the tax on the United States Government. The Court in United States of America v. California State Board of Equalization, further stated at 1132, that "despite the facial neutrality of (Civil Code) Section 1656.1, the strong economic incentive created by (Revenue and Taxation) Section 6012 all but compels the lessor to collect the tax from the lessee. In sum, the California sales tax scheme manifests a legislative intent that the lessee pay the sales tax. It places the legal incidence of the tax on the United States, and, therefore, violates the United States' constitutional immunity from state

taxation." Appellant was not in a position to make an illusory election that he believed would be illegal in view of the fact that his lessee was the government of the United States.

The facts and applicable law of the case at bar have a stronger similarity to the facts in United States of America v. California State Board of Equalization, supra., than to the facts and applicable law of either Newco Leasing, Inc. v. State Board of Equalization, supra. or U.S. v. New Mexico, supra. Appellant respectfully requests that the logic of United States of America v. California State Board of Equalization, supra. be applied in this case.

CONCLUSION

WHEREFORE, Appellant as petitioner herein respectfully submits that this

petition be granted and that a rehearing be had on the points specified herein.

Dated: January 15, 1993

Respectfully submitted,

LAW OFFICE OF LEONARD E. ARON

By: /s/
Lorie Katz

d. Petition for Review

SUPREME COURT

STATE OF CALIFORNIA

MIRA SLOVAK AEROBATICS, INC., doing business as MIRA SLOVAC AVIATION, INC.,	2nd Civil No.B061724 (Superior Court No: C758135 Los Angeles County)
Plaintiff/Appellant.	
vs.	
STATE BOARD OF EQUALIZATION	
Defendant/Respondent.	

Los Angeles County Superior Court No. C 758 135

The Honorable Judith C. Cherlin, Judge

PETITION FOR REVIEW

This case presents the issue of the constitutionality of the scheme of imposition of Use Tax by the State of California upon mobile transportation equipment leased to the United States Government. This is a case of first impression as the statutes involved have never been interpreted by any Court.

Appellant, Mira Slovak Aviation, Inc. is a dealer in airplanes, four of which were leased to the United States Government. The State of California and the Court below held that the incidence of the Use Tax imposed upon this transaction falls upon Mira Slovak Aviation, Inc. pursuant to U.S. vs. New Mexico (1982), 455 U.S. 720, a case commonly referred to as a Federal contractor case. Appellant has unsuccessfully argued below that the

facts of this case should be controlled by the logic of UNITED STATES of AMERICA v. CALIFORNIA STATE BOARD OF EQUALIZATION, (CA-9, 1981) 650 F.2d 1127; aff'd (1982) 456 US 901 which is not a Federal contractor case.

The Court below did not and would not mention in its Opinion UNITED STATES of AMERICA v. CALIFORNIA STATE BOARD OF EQUALIZATION, (CA-9, 1981) 650 F.2d 1127; aff'd (1982) 456 US 901.

It is respectfully submitted that until a Court explains why the logic of UNITED STATES of AMERICA v. CALIFORNIA STATE BOARD OF EQUALIZATION, (CA-9, 1981) 650 F.2d 1127; aff'd (1982) 456 US 901 is not applicable, this case has not been given adequate consideration.

WHEREFORE, Appellant as petitioner herein respectfully submits that this

petition be granted and that a review be had on the points specified herein.

Dated: February 8, 1993.

Respectfully submitted,

LAW OFFICE OF LEONARD E. ARON

By: s/s
Leonard E. Aron